# Supreme Court of the United States

OCTOBER TERM, 1922

No. 934

FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE,
*Complainants-Appellants,*

*against*

MANUEL MENDIA MORALES, AND OTHERS,
*Defendants-Appellees.*

**Appeal from the District Court of the United States for Porto Rico**

## MOTION TO AFFIRM, OR ADVANCE, OR VACATE STAY

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# Supreme Court of the United States,

OCTOBER TERM, 1922.

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| FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE,<br>Complainants-Appellants,<br>*against*<br>MANUEL MENDIA MORALES, JUAN B. ARZUAGA GONZALEZ, MIGUEL MOCOROA ARZUAGA, JUAN JOSE ARZUAGA BERAZA, JOSE MARIA ARZUAGA BERAZA, CEFERINO ARZUAGA, and EUGENIO MURUA PENA-GARIGANO, doing business under the firm name of SOBRINOS DE EZQUIAGA, and the BANK OF NOVA SCOTIA,<br>Defendants-Appellees. | No. |

APPEAL FROM DECREE OF DISTRICT COURT OF UNITED STATES FOR PORTO RICO DISMISSING BILL FOR WANT OF JURISDICTION—TAKEN ORIGINALLY TO CIRCUIT COURT OF APPEALS FOR FIRST CIRCUIT AND TRANSFERRED TO THIS COURT UNDER ACT OF SEPTEMBER 14, 1922.

## MOTION.

Now come the above named appellees and respectfully move this honorable Court,

1. To affirm the decree (under Subdivision 5 of Rule 6), upon the ground that the questions

involved are frivolous and the appeal was taken for delay only; *or*

2. To advance the cause for immediate hearing under Rule 32; *or*

3. To vacate the stay granted by the District Court pending the determination of the appeal on the ground that said stay was granted without jurisdiction and in violation of Section 265 of the Judicial Code and in abuse of discretion.

The following is a brief statement of the facts and matter involved and of the reasons for the application:

In September, 1922, the appellees commenced proceedings in one of the insular courts of Porto Rico to foreclose a mortgage for $129,881.13 upon real estate owned by a co-partnership of which the appellants are members (Rec., p. 7). The appellants thereupon brought a suit in another insular court to rescind and annul the mortgage (*id.*, p. 8). Being unable, under the local law, to enjoin the foreclosure proceedings (*id.*, p. 8), they then filed a bill in the United States District Court for Porto Rico to enjoin the prosecution of the foreclosure proceedings "until the termination of the suit filed in the local courts by your orators for the setting aside of the above mentioned contracts and mortgage deed" (*id.*, p. 9). *An injunction is the only relief prayed for.*

The bill shows that the appellees were the holders of a promissory note of the appellants' firm (Rec., pp. 5, 5); that they filed a suit in the insular court "directly against the firm" to recover upon the note (*id.*, p. 6); that an agreement of settlement was then made whereby the firm was to buy certain stock from the appellees and give a mortgage to secure payment of the stipulated

price (*id.*, pp. 6, 7), the agreement being signed on behalf of the firm by the same attorney who afterwards filed the bill for the appellants (*id.*, p. 14); *that the contract of settlement was submitted to the court in which the suit upon the note was pending and upon motion of both parties the court entered a judgment sanctioning the agreement and commanding both parties to adhere to and execute the same* (*id.*, pp. 11, 14). The bill further avers that both the note and the agreement of settlement and the mortgage were given by one of the partners "without authority" (*id.*, pp. 5-7), but the allegation is made *purely by way of conclusion, without the averment of any supporting facts.* There is no averment that the attorney who signed the agreement and consented to the judgment was not authorized so to do, nor is it suggested that the judgment was improperly obtained or is invalid or not binding. Neither is there any offer to return the stock received for the mortgage or any averment that the appellants are in a position to return it.

The District Court, on January 5, 1923, dismissed the bill for want of jurisdiction (*id.*, pp. 33-39, particularly 35, 39). The complainants appealed to the Circuit Court of Appeals for the First Circuit (*id.*, pp. 41, 42); and the District Court, on January 9, 1923, granted a stay of the foreclosure proceeding "for ninety days from this date or until such action as may be taken by the Court of Appeals at Boston" (*id.*, pp. 42, 46).

The case was argued in the Circuit Court of Appeals, and on March 15, 1923, that court, of its own motion, transferred the appeal to this court under the Act of September 14, 1922 (Judicial Code, §238a, 42 Stat., 837), upon the ground that inasmuch as the bill was dismissed for want of

jurisdiction the appeal should have been taken directly to this court under Section 238 of the Judicial Code.

## I.

**The granting of the only relief prayed in the bill is expressly prohibited by Section 265 of the Judicial Code, and for that reason the appeal is frivolous.**

Section 265 of the Judicial Code (formerly Section 720 U. S. Rev. Stat.) provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The conditions under which Federal Courts, despite that provision, may issue injunctions were carefully enumerated in *Wells Fargo & Co.* vs. *Taylor,* 254 U. S., 175. A bare inspection of the bill demonstrates that none of those conditions exists here. There is no previously-acquired Federal jurisdiction to be protected or enforced, and the bill for injunction was filed after the commencement of the proceeding sought to be enjoined and before its termination.

The case at bar is completely controlled by *Essanay Film Co.* vs. *Kane,* 258 U. S., 358, in which this court specifically asserted (p. 361):

> "That appellants' objection to the action sought to be restrained rests upon a fundamental ground and one based upon a

provision of the Constitution of the United States, does not render the effort to stay proceedings in the State Court any the less inconsistent with Section 265, Judicial Code."

That Section 265 applies to Porto Rico (i. e., that it prohibits the Federal Court in Porto Rico from enjoining proceedings in the insular courts) is clear, not only from the character and purpose of the statute, but, also, from the provisions of Section 1891 of the United States Revised Statutes and Section 14 of the Organic Law of Porto Rico of 1900 and Section 58 of the Organic Law of Porto Rico of 1917. By those statutes all laws of the United States "not locally inapplicable" are declared to be in force in Porto Rico and all organized Territories.

## II.

**There is neither citizenship nor Federal question sufficient to support jurisdiction, and for that reason, also, the appeal is frivolous.**

There is no allegation that all the parties on either side of the controversy are not domiciled in Porto Rico, and hence the citizenship requisite to confer jurisdiction is wanting.

*Porto Rico Ry., L. & P. Co.* vs. *Mor*, 253 U. S., 345;
*Vere* vs. *Bianchi*, 266 Fed., 367.

An attempt is made to present a Federal question by the allegation that a sale of the property

in the foreclosure proceeding before the appellants' suit for rescission of the mortgage is determined will deprive them of their property without due process of law (Rec., pp. 8, 9). But the question thus suggested is *too frivolous and unsubstantial to confer jurisdiction.*

> *Underground Railroad* vs. *New York*, 193 U. S., 416;
> *Newburyport Water Co.* vs. *Newburyport*, 193 U. S., 561, 576;
> *Ramapo Water Co.* vs. *New York*, 236 U. S., 579.

In the first place, the bill does not show that the appellants have a *right* to have the mortgage rescinded. On the contrary, it appears upon the face of the bill that they are estopped by judgment from attacking the validity of the mortgage.

> *White* vs. *Crow*, 110 U. S., 183, 187, 188;
> *Crouse* vs. *McVickar*, 207 N. Y., 213, 217-219.

But even if the bill be construed as presenting a question as to the constitutionality of the Mortgage Law of Porto Rico, that question is not sufficient to sustain jurisdiction because it is *wholly without merit.*

The constitutionality of the Porto Rican system of mortgage foreclosures was sustained by the Supreme Court of Porto Rico in *Gimenez* vs. *Drenes*, 10 Porto Rico, 124, in which that court said (p. 132):

> "It has also been affirmed that the summary proceedings for the recovery of mortgage debts is in opposition to the constitutional provision that no person shall be de-

> prived of life, liberty, or property, without due process of law.
>
> "This argument is without strength and we think its supporters will be few."

In *Torres* vs. *Lothrop*, 231 U. S., 171, this court appears to have taken special pains to shut off further controversy over the point by asserting the frivolousness of the contention. In that case the question was argued at some length (p. 172), and although the question was not technically open, Chief Justice WHITE, speaking for a unanimous court, took occasion to say (p. 177):

> "The summary or executory process provided by the mortgage law, which was followed in foreclosing the Torres mortgage, it is insisted was so deficient in notice or so wanting in opportunity to defend as to cause that law to be repugnant to the due process clause of the Constitution of the United States. Without pausing to apply the elementary doctrine that the due process clause does not control the mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded (*Louisville & Nashville Railroad Co.* vs. *Schmidt*, 177 U. S., 230), and *without stopping to indicate how clearly these fundamental rights were provided for as demonstrated by the facts which we have enumerated*, we think it suffices to say that it does not appear that the contention of want of due process was urged either upon the trial court, or was assigned as error in the court below, or was passed upon by that court. And as in its opinion in this case concerning another subject the court below pointed out that it was without authority to consider errors complained of which were not presented to the trial court, it follows that in any view, it could not be

held that the court below erred in deciding a matter which it did not decide and which it had no authority to pass upon."

A casual reading of Articles 127 to 134 of the Mortgage Law and of Articles 168 to 175 of the Mortgage Law Regulations will demonstrate the soundness of that conclusion. Briefly stated, the Law and the Regulations taken together require that the mortgagee present to a court proof of his capacity to sue and of his ownership of the mortgage and of its non-payment. Notice to the debtor must be given, and he is allowed to prove payment and is also given an opportunity to pay before a sale is had. All claims and defenses other than payment may be presented and heard *"in the proper plenary action,"* whether those claims be by the debtor or by third persons in possession or by other persons interested (Regulations, Art. 175). It is true that these other claims are not permitted to delay the sale, but provision is made that the mortgagee cannot get his money until the claims are determined if the judge thinks that course is proper (Idem.) *Obviously, therefore, there is both notice and an opportunity to be heard and an opportunity to present all claims.*

It is true that in some cases the land may be sold before the claims asserted in the plenary action are determined, but in that plenary action the plaintiff may file a *lis pendens* or "cautionary notice" and that is sufficient for his protection.

*Romeu* vs. *Todd*, 206 U. S., 358;
*American Trading Co.* vs. *Monserrat*, 18 P. R., 268.

See, also,

*Mortgage Law*, Sec. 42;

*Mortgage Law Regulations,* Sec. 91;
*Code, Civ. Proc.,* Sec. 91.

Those cases and statutory provisions clearly demonstrate that, in suits of the character of the one brought by the appellants in the insular court to rescind the mortgage, the local law of Porto Rico authorizes the filing of a "cautionary notice" (similar to the *lis pendens* or notice of pendency of action generally provided for in perhaps all the States of this Union), the effect of which is to make the title of a subsequent purchaser subject to the result of the litigation; and it is because the filing of such a cautionary notice affords a complete and adequate remedy that the courts of Porto Rico refuse to enjoin mortgage foreclosure proceedings for any reason except the reasons expressly set forth in Section 175 of the Mortgage Law Regulations.

In *American Trading Co.* vs. *Monserrat, supra,* it was argued that prior decisions holding that a mortgage foreclosure proceeding could not be enjoined were not applicable after the enactment of the Injunction Law of 1906, but the court held otherwise and expressly stated (pp. 271, 272):

> "Moreover, we do not think it was the intention of the Legislature to permit a debtor to do by way of injunction what he could not otherwise do, namely, suspend a summary proceeding. *His remedy is by way of an ordinary suit with a cautionary notice in the Registry of Property.*"

It appears, therefore, that looking at the matter in the light most favorable to the appellants, they have a complete and adequate remedy by the simple device of filing their cautionary notice with the Registry of Property.

It necessarily follows that there is no denial

of due process of law and even no need for the interposition of equity.

*To say that the Mortgage Law of Porto Rico is unconstitutional because it does not permit any defense other than that of payment to be interposed in the foreclosure proceeding is about as sensible as saying that our own common law system of procedure is unconstitutional because it does not permit the interposition of equitable defenses in actions at law.*

The system of mortgage foreclosures prevailing in Porto Rico is of ancient origin. It is in general accord with the system prevailing in all civil-law countries. The policy of Congress has been to preserve to the people of that island the system of local law to which they have been accustomed (*Romeu* vs. *Todd*, 206 U. S., 358, at p. 369), and, on the other hand, Congress has been sedulous to avoid forcing upon those people some institutions that we regard as the palladium of our liberties (*Balzac* vs. *Porto Rico*, 258 U. S., 298, 310, 311). Consequently, a law that prevailed in that island long prior to its cession to the United States would have to be most outrageously shocking to our notions of justice before it could be said that due process of law in Porto Rico requires the up-setting of its long-established institutions.

The Fourteenth Amendment carries no mandate for procedural reforms (*Ownbey* vs. *Morgan*, 256 U. S., 94, 112), and our courts have not been commissioned to remodel the civil law according to common law conceptions (*Diaz* vs. *Gonzalez*, decided Feb. 19, 1923).

Finally, it is to be noted that the whole sum and substance of the appellants' grievance is that they claim that one of their partners exceeded his authority. It could not be said to be a denial

of due process of law if no remedy at all as against third persons were provided for such a case. So far as the Constitution is concerned, it would be within the competency of any State to provide that the members of a firm should themselves take the risk of one of the members going further than they thought he ought, *i. e.*, that they should be bound by all his dealings with third persons and should be confined to an action against him for any damage they might suffer as a result of his violation of the partnership agreement.

## III.

**The case made by the appellants in support of their application for injunction is so patently inadequate and so entirely devoid of merit as to make the granting of the stay an abuse of discretion.**

The incongruity of the action of the District Court in denying that it had jurisdiction to do a thing and then doing the very thing which it had decided it had no power to do is manifest.

Aside, however, from the question of jurisdiction, it was an abuse of discretion to grant the stay because it is apparent that the appellants cannot suffer any irreparable injury. As already pointed out, immediately upon bringing their suit to rescind the mortgage the appellants could file a cautionary notice or *lis pendens* in the Registry of Property.

*Code of Civil Procedure*, §91;
*Mortgage Law*, §42;
*Mortgage Law Regulations*, §91

And it has been specifically held by the Supreme Court of Porto Rico that the filing of such a notice affords an adequate remedy.

> *American Trading Co.* vs. *Monserrat*, 18 Porto Rico, 273.

The fact that the bill shows upon its face an *estoppel by judgment* is a further reason why the stay should not have been granted.

Still further, and coming to the actual merits of the appellants' case, we find an utter lack of that state of facts which always is necessary to move a court of equity to the granting of relief by way of injunction.

The sole and only ground asserted as a basis either for the rescission of the mortgage or for the injunction sought in this suit is that Juan Bianchi, who is described as "one of the managing partners of Sucesores de Bianchi" was "without power or authority by the articles of co-partnership" to give the mortgage and that he gave it "entirely without power or authority because of the articles of partnership and without the consent or knowledge of the complainants" (Rec., pp. 4, 5). In addition to those allegations the bill contains the following (*id.*, p. 5):

> "And your orators further allege that your orators had no knowledge or notice of the execution of said so-called mortgage deed, or of its recording in the Registry of Property, nor do the articles of partnership give to any of the partners of Sucesores de Bianchi the power to use the firm name to accommodate third parties, or to in any way secure negotiable paper, nor to execute mortgages upon the real estate belonging to the partnership, nor have your orators in any way given their consent to any and all of the aforesaid acts

> of the partner Juan Bianchi done entirely without their authority and exceeding his powers as said managing partner of the said Sucesores de Bianchi."

*Those allegations, however, obviously are mere conclusions of the pleader, which are not admitted by the motion to dismiss* (*Equitable Life Assurance Society* vs. *Brown*, 213 U. S., 25, 43; *United States* vs. *Ames*, 99 U. S., 45, 46), *and no facts are set forth to support them.*

The articles of co-partnership are not exhibited with the bill, no statement is given as to how the business of the partnership was actually carried on, and no showing is made as to the extent to which Juan Bianchi was held out to the public as having authority to act on behalf of the firm. In short, the appellants presented nothing but their own general assertion that Juan Bianchi was not authorized to do what he did. Whether or not he was authorized is a question depending upon many elements, and the burden was upon the appellants to show *facts* from which the court itself might draw its own conclusion as to whether or not the requisite authority existed.

On the other hand, it affirmatively appears that a suit was brought against the firm, and, as already stated, the mortgage was given as the result of an agreement of settlement made and entered of record as the judgment in that suit. There is no allegation of any lack of service of process in that suit. Presumptively, the process was regularly served, and it is expressly provided by statute that even where process is served upon only one member the judgment is binding upon all (Code, Civ. Proc., Sec. 73). The agreement, as we have stated above, was signed by "Cay Coll Cuchi, attorney for defendant" (Rec., p. 11)

That must mean attorney for the *firm* and there is no pretense or allegation that Cay Coll Cuchi was not authorized to sign the agreement.

In brief, therefore, we have this situation: The mortgage was given pursuant to an agreement of settlement of an action in which the firm was a defendant and represented by an attorney whose authority is unquestioned, and that agreement made the judgment of the court. Without returning or offering to return the consideration which the firm received for the mortgage, two members of the firm now come into court by the same attorney who made the agreement and allege, purely by way of conclusion, that the managing partner who signed the mortgage was without authority. The allegation of lack of authority is not supported by any proof whatsoever except the oath of one of the complainants who does not substantiate the conclusion to which he swears by reference to any facts whatsoever.

Such a showing as that is entirely too meager to justify any court in holding up the regular and ordinary procedure established by law for the collection of a mortgage debt.

Respectfully submitted,

CARROLL G. WALTER,
120 Broadway,
New York,
Counsel for Appellees.

March, 1923.

## NOTICE OF MOTION.

SIRS:

Please take notice that the appellees will submit the foregoing motion at a stated term of the court to be held at the Capitol in the City of Washington on April 16, 1923, at the opening of court on that day or as soon thereafter as counsel can be heard.

Yours, &c.,

CARROLL G. WALTER,
Counsel for Appellees.
120 Broadway,
New York, N. Y.

To GEORGE W. STUDY, Esq.,
BOUVIER, CAFFEY & BEALE,
Counsel for Appellants.

# Supreme Court of the United States

OCTOBER TERM, 1922.

No. 934.

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FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE,
Complainants-Appellants,

—against—

MANUEL MENDIA MORALES, and others,
Defendants-Appellees.

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**Appeal from the District Court of the United States for Porto Rico**

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## MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM, OR ADVANCE, OR VACATE STAY.

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# Supreme Court of the United States

OCTOBER TERM, 1922.

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| FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE, Complainants-Appellants, —against— MANUEL MENDIA MORALES, JUAN B. ARZUAGA GONZALEZ, MIGUEL MOCOROA ARZUAGA, JUAN JOSE ARZUAGA BERAZA, JOSE MARIA ARZUAGA BERAZA, CEFERINO ARZUAGA, and EUGENIO MURUA PENA-GARIGANO, doing business under the firm name of SOBRINOS DE EZQUIGA, and the BANK OF NOVA SCOTIA, Defendants-Appellees. | No. 934. |

APPEAL FROM DECREE OF DISTRICT COURT OF UNITED STATES FOR PORTO RICO DISMISSING BILL FOR WANT OF JURISDICTION—TAKEN ORIGINALLY TO CIRCUIT COURT OF APPEALS FOR FIRST CIRCUIT AND TRANSFERRED TO THIS COURT UNDER ACT OF SEPTEMBER 14, 1922.

## MEMORANDUM IN OPPOSITION TO MOTION.

The following is a statement of the facts:

The two complainants, Francisco Bianchi and Rosario B. De Esteve, and one Juan Bianchi were copartners doing business in Porto Rico under the firm name and style of Sucesores de Bianchi.

The citizenship of all parties to this action is set forth in paragraph "I" of the bill of complaint (Rec., p. 2) as are also the details as to the origin and scope of the copartnership and the agreement of settlement and the mortgage (Rec., p. 10).

The West Porto Rico Sugar Company, a corporation, being indebted to the individual defendants doing business under the firm name of Sobrinos de Ezquiaga in the sum of $200,000, Juan Bianchi, in the name of Sucesores de Bianchi, without power or authority by the articles of copartnership, and without the knowledge or consent of these complainants, signed an obligation, to wit, a promissory note, as principal, for the sum of $200,000, guaranteeing to Sobrinos de Ezquiaga payment of the said sum or any portion thereof that should be unpaid at the time of its maturity. The West Porto Rico Sugar Company at the time of the maturity of the note had failed to pay to Sobrinos de Ezquiaga the sum of $129,881.13. Sobrinos de Ezquiaga then filed a suit in equity in the District Court of San Juan, Porto Rico, demanding from Sucesores de Bianchi the full payment of the amount due as principals upon the accommodation note.

Juan Bianchi then entered into a contract of settlement (Rec., p. 10) with Sobrinos de Ezquiaga without power or authority therefor by the articles of copartnership, and without the knowledge or consent of these complainants, the terms and conditions of which are not material on this motion except that as a part of said agreement Juan Bianchi, also without power and authority by the articles of copartnership, and without the knowledge or consent of these complainants, gave to Sobrinos de Ezquiaga a first mortgage upon the

real property owned by the complainants (Rec., p. 3) to secure the payments provided for in the said contract of settlement.

Sobrinos de Ezquiaga subsequently gave to the defendant Bank of Nova Scotia a sub-mortgage for the sum of $50,000.

Default having been made in the payments to Sobrinos de Ezquiaga provided for in the contract of settlement, Sobrinos de Ezquiaga, on September 28th, 1922, filed in the District Court of Mayaguez, Porto Rico, a petition to foreclose the said mortgage in accordance with the mortgage law of Porto Rico. Pursuant to the summary judgment provided for by the mortgage law and of which these complainants received proper summons in accordance with the law, Sucesores de Bianchi were directed to pay to Sobrinos de Ezquiaga the sums guaranteed to Sobrinos de Ezquiaga by the aforesaid mortgage.

It is conceded that the mortgage law of Porto Rico, of which more will be said hereafter, in a foreclosure action such as the one in question, permits of no defense except the defense of payment; that upon the filing of a petition to foreclose a mortgage the Court directs payment of the amount due within thirty days after service thereof upon the mortgagors and upon failure to make payment within thirty days the property is sold forthwith. Under the laws of Porto Rico any defense that might under our law be interposed in an action brought to foreclose a mortgage may be made the subject of a separate action to annul the mortgage. However, there is no provision for injunctive relief and pending the hearing and determination of the second action the property affected, because of the summary nature of the mortgage foreclosure proceeding, may be sold. The only remedy then left

to the mortgagors in case the action to annul the mortgage is successful is to pursue the property and through further legal action regain possession.

These complainants on October 15th, 1922, did file in the District Court for the Judicial District of San Juan, First Section, a suit against the defendants herein for the annulment of the accommodation security given by Juan Bianchi in the name of Sucesores de Bianchi to the defendant Sobrinos de Ezquiaga and for the rescision and annulment of the contract of settlement and of the mortgage and of its recording in the registry of property and that suit is now pending.

On October 21st, 1922, these complainants filed their bill of complaint (Rec., p. 1) in the District Court of the United States for Porto Rico, praying that a writ of injunction be issued enjoining the defendants herein, their agents, employees and representatives, from taking any further proceedings in the prosecution of their action to foreclose the mortgage in question until the termination of the suit filed by these complainants for the setting aside of the contracts and mortgage deed (Rec., p. 9).

On October 21st, 1922, Hon. Arthur F. Odlin, United States District Judge, issued a rule to show cause returnable November 4th, 1922, and granting a temporary stay against the defendants (Rec., p. 22). On October 24th, 1922, a second rule to show cause was issued returnable November 4th, 1922, similar to the previous one, enjoining not only the defendants herein but also all officials in any way interested in the foreclosure action (Rec., p. 23).

On October 30th, 1922, Judge Odlin directed that these complainants give their bond in the sum of $150,000, to protect the defendants and such a bond

was filed on November 2nd, 1922 (Rec., pp. 30-31). On January 5th, 1923, Judge Odlin delivered the order and opinion of the Court (Rec., p. 33) in which he dismissed the bill of complaint for lack of jurisdiction, and the temporary restraining order was thereby vacated.

On January 6th, 1923, the complainants filed their appeal and a motion was made for an order granting a stay of all proceedings pending the appeal to the United States Circuit Court for the first Circuit from the order and opinion of Judge Odlin (Rec., pp. 40-41). This application was made upon notice to the defendants.

On January 9th, 1923, Judge Odlin rendered an order and opinion (Rec., p. 42) restoring the temporary restraining order issued on October 24th, 1922, for ninety days from January 9th, 1923, or "until such action as may be taken by the Court of Appeals at Boston." The order directed that these complainants give their bond in the sum of $25,000, payable to the defendants as security pending this appeal and a bond in that amount was filed January 17th, 1923 (Rec., p. 46).

The defendants then made a motion on January 24, 1923, with notice that it would be brought on for argument before the Circuit Court of Appeals for the First Circuit on February 13th, 1923. This motion prayed that the Circuit Court vacate the temporary restraining order of Judge Odlin under date of January 9th, 1923. Upon the hearing of this motion the motion and the appeal were combined and the stay continued. On March 15th, 1923, the Circuit Court of Appeals, of its own motion, transferred the appeal to this Court under the Act of September 14, 1922 (Judicial Code, Sec. 238a, 42 Stat., 837), upon the ground that as the bill was dismissed for want of jurisdiction the appeal should

have been taken directly to this Court under Sec. 238 of the Judicial Code.

The mortgage law of Porto Rico insofar as it involves the summary nature of the proceeding is found in Articles 169 to 175 inclusive, pages 1141 to 1143, of the "Compilation of the Revised Statutes and Codes of Porto Rico."

## I.

## THIS COURT HAS POWER TO GRANT THE RELIEF PRAYED FOR IN THE BILL.

The appellees rely upon section 265 of the Judicial Code as prohibiting the granting of the relief prayed for in the bill.

In *American Mutual Liability Ins. Co. vs. Volpe*, 284 Fed. 75, 77, the Court in discussing section 265 of the Judicial Code states as follows:

> "Where the elements of Federal and equity jurisdiction are present this provision of the Judicial code, which has been in force for more than a century, does not prevent Federal courts from enjoining proceedings: (1) To enforce local statutes which are repugnant to the Constitution of the United States. *Ex parte Young*, 209 U. S. 123, .....; *Truax vs. Raich*, 239 U. S. 33; ..... *Missouri vs. Chicago, Burlington & Quincy Railroad Co.*, 241 U. S. 533, 538, 543."

The relation of Porto Rico to the United States is more clearly defined in the recent case of *Balzac vs. Porto Rico*, 258 U. S. 298, which reviews the Organic Act for Porto Rico and the relation of Porto Rico to the United States. Mr. Chief Justice Taft says:

"The United States District Court is not a true United States court established under Articles III of the Constitution to administer the judicial power of the United States therein conveyed. It is created by virtue of the sovereign congressional faculty, granted under Article IV, §3, of that instrument, of making all needful rules and regulations respecting the territory belonging to the United States. The resemblance of its jurisdiction to that of true United States Courts in offering an opportunity to non-residents of resorting to a tribunal not subject to local influence, does not change its character as a mere territorial court. Nor does the legislative recognition that Federal constitutional questions may arise in litigation in Porto Rico have any weight in this discussion. The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. This has not only been admitted but emphasized by this court in all its authoritative expressions upon the issues arising in the *Insular* Cases, especially in *Downes vs. Bidwell* and the *Dorr* Cases. The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular* Cases was not whether the Constitution extended to the Phillipines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal

rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law had from the beginning full application in the Phillipines and Porto Rico, and, as this guarantee is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico. Indeed, provision is made for the consideration of constitutional questions coming on appeal and writ of error from the Supreme Court of the Phillipines, which are certainly not incorporated in the Union. Judicial Code, §248.

"On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow."

*Downes vs. Bidwell*, 182 U. S. 244;
*Dorr vs. United States*, 195 U. S. 138;
Organic Law for Porto Rico, Act March 2, 1917, v. 145.

It is true that in considering the constitutionality of state statutes the Federal courts are not inclined to assume jurisdiction until the question has first been passed upon by a court of last resort in the state of enactment and this rule is again established in the case of *Louisville & N. R. Co. vs. Garrett*, 231 U. S., 298, 305, in which Hughes, J., says:

"So far as we are advised, the Court of Appeals of Kentucky has not passed upon the validity of the Act in question and this Court

> has often expressed its reluctance to adjudge a state statute to be in conflict with the Constitution of the state before that question has been considered by the state tribunals,—to which it properly belongs,—unless the case imperatively demands such a decision. * * * Here, the argument against the statute is not of that compelling character."

The headnote has the following summary:

> "All questions local as well as Federal may be determined by a Federal Circuit Court upon an application for a preliminary injunction to restrain the enforcement of a state statute upon the ground of its unconstitutionality."

This question has been fully discussed and passed upon in this court arising in the United States District Court for Porto Rico. In the case of *West India and Panama Telegraph Co. vs. Benedicto,* 10 P. R. R. 444, 446, the Court says:

> "2. It is contended that the Federal court has no jurisdiction to decide whether local legislation conflicts with the Organic Act of Porto Rico. It has been decided that the Federal court cannot test the validity of state legislation under the state Constitution. *Jackson vs. Cravens,* 235 Fed. 212; *Louisville & N. R. Co. vs. Garrett,* 231 U. S. 298; 58 L. ed. 229, 34 Sup. Ct. Rep. 48. The laws of a territory are not, as such, laws of the United States. *Ex parte Moran,* 75 C. C. A. 396, 144 Fed. 594, 603; *Tenn. vs. The Union & Planters Bank,* 152 U. S. 454, 462, 38 L. ed. 511, 514, 14 Sup. Ct. Rep. 654; *Snow vs. United States,*

118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059. While the laws of a territory are necessarily limited by the laws of the United States which create the territory, the laws of a territory are not, as such, laws of the United States. As observed by Mr. Justice Holmes, any other rule would be indefinitely widening the jurisdiction of the Federal courts. *American Secur. & T. Co. vs. District of Columbia,* 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553.

"If this case rested upon violation of a local statute alone, it might, therefore, be that this court had no jurisdiction. The bill as framed, however, goes much further than this, and alleges violation of the Organic Act itself, as well as of the Constitution of the United States. If there is merit in the contention, further allegations might be regarded as surplusage, and at all events would not necessitate the dismissal of the whole bill."

This case came up on appeal under the title of *Benedicto vs. West India & Panama Telegraph Co.,* 256 Fed. 417, 419, and in a well considered opinion by Aldrich, J., is found the following statement:

"Under the Organic Act of Congress, the United States District Court for Porto Rico takes equity jurisdiction, in its comprehensive sense, with the authority and the duty to administer equity according to its usual and ordinary course, and we hold that view because we think that the provision in respect to three judges has reference to State statutes and Constitutions, because of the independence and peculiar relations of the states to the Federal

government and not to Porto Rico, and because the administration there of the three-judge provision would be locally inconvenient and practically inapplicable, and because it is not clear that Congress intended that interlocutory injunction questions should require the presence of three judges in preliminary equity proceedings in that Island.

"Section 41 of what is called the New Organic Act of Porto Rico provides that the United States District Court for that Island 'shall have jurisdiction of all cases cognizable in the District Courts of the United States, and shall proceed in the same manner.' (Act March 2, 1917, c. 145, 39 Stat. 951 [Comp. St. 1918, §3803qq]); but this we think was a grant of general equity powers, and, in conferring such general jurisdiction, that Congress did not intend to qualify it by Section 266, which, as we have said, relates to the laws and the Constitution of the states under their peculiar relations and reserved rights under the Federal Constitution."

Another distinction that may be made in holding that the rules do not and should not apply to matters arising in Porto Rico in which constitutional questions are involved is that the laws of the several states comprising the United States are based upon the same general principles as are the Federal laws, each being founded on the common law or being consistent therewith. The laws of Porto Rico are founded upon the old Spanish law and where they conflict in principal with the common law, the Organic Act for Porto Rico or the Constitution of the United States, the Courts should use such equity jurisdiction as will render them consistent.

## II.

## THE BILL OF COMPLAINT SETS FORTH FACTS WHICH SHOW THE MORTGAGE LAW OF PORTO RICO TO BE IN CONFLICT WITH THE CONSTITUTION OF THE UNITED STATES AND THE ORGANIC ACT FOR PORTO RICO.

The Organic Law for Porto Rico (Act of March 2, 1917) provides:

> "Sec. 2. That no law shall be enacted in Porto Rico which shall deprive any person of life, liberty or property without due process of law or deny to any person therein the equal protection of the laws."

The important rules regulating the Judicial department are found in sections 40, 41, 42 and 43 of said Act.

> "Sec. 57. The laws and ordinances of Porto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided for Porto Rico or by Act of Congress of the United States. * * *"
>
> "Sec. 58. That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this act * * * are hereby continued in effect and all laws and parts of laws inconsistent with the provisions of this act are hereby repealed."

In the case of *Torres vs. Lothrop,* 231 U. S. 171, the Court discusses the provisions of the mortgage law of Porto Rico but no facts are set

forth which could be made the basis of an action under the laws of Porto Rico to annul the mortgage or which could be set up as a proper defense in a foreclosure action in the United States.

At page 177 the Court says:

> "And as in its opinion in this case concerning another subject the Court below pointed out that it was without authority to consider errors complained of which were not presented to the trial court, it follows that in any view, it could not be held that the Court below erred in deciding a matter which it did not decide and which it had no authority to pass upon."

The only case in which the constitutionality of the mortgage law of Porto Rico has been fully discussed is in *Gimenez vs. Brenes*, 10 P. R. R. 144.

That case was decided in the year 1906 by the Supreme Court of Porto Rico. No better argument to show the unconstitutionality of the mortgage law could be presented than the dissenting opinion of Mr. Justice MacLearey found at page 136, in which he argues that the mortgage law of Porto Rico is unconstitutional and sets forth in great detail the history of this law and its application.

After holding in his opinion that the mortgage law is unconstitutional and that it constitutes the taking of property without due process of law he finally aptly says at page 161:

> "But the proposition has been advanced by some very respectable persons, learned in the law, in connection with this matter, that the laws on this subject might be so construed that both methods of mortgage foreclosure, that is to say the ancient Spanish and the modern American, might still remain legal and effec-

tive. In my opinion this is not tenable, because it is the general consensus of Judicial authority that the Legislature cannot be supposed to have intended that there should be two distinct and contradictory enactments embracing the same subject matter in force at the same time. It would be quite unreasonable and might lead to very serious consequence if this Court should hold that two distinct, conflicting and absolutely opposite, methods for accomplishing the same objects could be effective at the same time, and the plaintiff or mortgagee could have the option to determine which method he would adopt and pursue."

*Luddy vs. Long Island City,* 104 N. Y. 227.

It is significant that Mr. Justice MacLearey was the only American member of this Court, the other members being Spanish lawyers who by experience and training undoubtedly went far afield in sustaining the law. The full force and effect of the opinion of Mr. Justice MacLearey can only be gotten by reading it in full.

As it is too lengthy to be embodied in this brief the attention of this Court is respectfully called to it.

## III.

## THE MOTION SHOULD BE DENIED AND THE STAY CONTINUED.

The question resolves itself into one of Federal equity jurisdiction. All the necessary elements are presented:

(1) Diversity of citizenship.

(2) That because of the summary procedure of the mortgage law of Porto Rico the complainants

will be deprived of their property and of its enjoyment without due process of law and denied the equal protection of the laws, all in violation of the Constitution of the United States and the Organic Act for Porto Rico.

It is submitted that the mortgage law of Porto Rico is a summary proceeding and that such an act would not be tolerated in any jurisdiction within the territorial boundaries of the United States. Under the common law, the constitution of the United States and of the several states and the statutory enactmens of the Federal and state governments such a summary proceeding for the foreclosure of a mortgage upon real property would be held to constitute the taking of property without due process of law and the denying to the injured party the equal protection of the law. The basic law of Porto Rico being the Spanish law, the United States is bound to recognize such part thereof as is not inconsistent with the Constitution and the Organic Act for Porto Rico. But when the local law in any particular instance contravenes the Constitution or the Organic Act then the Federal courts must assume jurisdiction; they must, if possible, weld the two together so that the local law will give full protection to property rights. If this cannot be done then they must hold the local law unconstitutional.

There is an apparent remedy in the action to rescind and annul the mortgage. But there is no power vested in the local courts to stay the summary process of the mortgage law. The owner of property is not accorded full protection such as he is entitled to under the Constitution and the Organic Act. The Federal courts with their broad equity powers must intervene. In the course of time the local laws should be based entirely upon or be consistent with the common law. This will

be a slow process and cannot be done by legislative enactment alone. The Federal courts must assume this responsibility of making the local laws consistent with our jurisprudence.

The cautionary notice provided for in the mortgage law, similar in some respects to our *lis pendens,* has not the effectiveness of the latter. A reading of the statute will show that it is most technical in its character and that it does not place such a cloud upon the title as does our notice of pendency of action.

The bill of complaint sets forth facts which show the extreme injustice permitted by the mortgage law of Porto Rico. Here there are allegations showing that the mortgage sought to be foreclosed is fraudulent, still under the summary proceeding of the mortgage law these defendants will be permitted to secure a judgment of foreclosure and sale of the property of the complainants even though the mortgage be fraudulent.

Judge Odlin in his opinion of January 9th, 1923 (Rec., p. 42) clearly shows that he appreciates the injustice that will be done these complainants unless the foreclosure proceedings are enjoined by the Federal courts as prayed for in the bill of complaint. He also shows that by reason of the bond filed January 17, 1923 (Rec., p. 46), and the fact that it was admitted upon the argument that the real estate covered by the mortgage in question is under lease to third parties for nine years longer (Rec., p. 43), these defendants are amply protected pending the trial and determination of the suit brought by the complainants to annul the mortgage.

Respectfully submitted,

PHELAN BEALE,
GEO. W. STUDY,
for Complainants-Appellants.

# Supreme Court of the United States

OCTOBER TERM, 1922

No. 984

FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE,
*Complainants-Appellants,*

*against*

MANUEL MENDIA MORALES, AND OTHERS,
*Defendants-Appellees.*

**Appeal from the District Court of the United States for Porto Rico**

## APPELLEES' REPLY ON MOTION TO AFFIRM, Etc.

CARROLL G. WALTER,
*Counsel for Appellees,*
120 Broadway, New York.

WM. SIEGRIST, INC., PRINTER, 9-15 MURRAY ST., N. Y.

# Supreme Court of the United States,

OCTOBER TERM, 1922.

| | |
|---|---|
| FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE, Complainants-Appellants, *against* MANUEL MENDIA MORALES, JUAN B. ARZUAGA GONZALEZ, MIGUEL MOCOROA ARZUAGA, JUAN JOSE ARZUAGA BERAZA, JOSE MARIA ARZUAGA BERAZA, CEFERINO ARZUAGA, and EUGENIO MURUA PENA-GARIGANO, doing business under the firm name of SOBRINOS DE EZQUIAGA, and the BANK OF NOVA SCOTIA, Defendants-Appellees. | No. 934. |

## APPELLEES' REPLY ON MOTION TO AFFIRM, ETC.

### I.

### As to Appellants' Statement of Facts.

At page 2 of their memorandum the appellants state that the original obligation and also the contract of settlement were made by their partner, Juan Bianchi, "without power or authority by the articles of co-partnership and without the knowledge or consent of these complainants." That assertion, however, has no better support than some averments of the bill

which consist solely of legal conclusions without any facts to sustain or justify them. But ever if Juan Bianchi acted without authority, that would not make out a case. The appellees' mortgage rests upon an agreement made by *the appellants' own attorney,* Cay. Coll Cuchi, who filed this bill on their behalf. (Rec. pp. 11-14, 9). It rests, also, upon a judgment of a court entered in a suit to which the appellants were parties (*id.,* pp. 11-15); *and neither the validity of the judgment nor the authority of Cay. Coll Cuchi is in any way attacked or questioned.* A bare inspection of the bill thus shows it to be without color of equity or merit. The bill itself shows that the appellants are estopped by judgment from attacking the validity of the mortgage.

At page 16 of the appellants' memorandum it is stated that there are allegations showing that the mortgage is *fraudulent,* but that is wholly untrue. There is no charge whatever of any fraud.

Another statement that must be attributed to inadvertence is the assertion at page 14 that there is the requisite diversity of citizenship. It has been adjudged by this court that the District Court for Porto Rico has no jurisdiction unless the parties on one side are "not domiciled in Porto Rico" (*Porto Rico Ry., L. & P. Co.* vs. *Mor,* 253 U. S., 345), and that situation does not exist here.

## II.

**As to the effect of Section 265, Judicial Code.**

The appellants make no reference whatever to

*Essanay Film Co.* vs. *Kane,* 258 U. S., 358, cited at page 4 of our motion papers. They make no attempt to distinguish that case for the very excellent reason that it is indistinguishable. It is a controlling authority justifying and requiring an affirmance of the decree in this case. There, as here, the claim was that the effect of the proceedings sought to be enjoined would be to deprive the plaintiff of property without due process of law; but this court held that, as the proceeding sought to be enjoined had been commenced and was still pending (as is the case here), the fact that the right to relief was based on constitutional grounds did not render the prohibition of Section 265 any the less effective.

The whole of the argument from pages 6 to 11 of the appellants' memorandum appears to be a labored effort to show that the United States District Court for Porto Rico has jurisdiction to determine the constitutionality of local statutes of Porto Rico. No one disputes that proposition as a general rule. In fact, it is obvious. But the question as to constitutionality must be real and substantial and not frivolous. And the existence of that jurisdiction does not give that court the power to issue injunctions in violation of Section 265. The United States District Court for the District of New Jersey has jurisdiction of all cases arising under the Constitution, but that fact did not prevent this court from holding that it could not enjoin proceedings in a State court of New Jersey even though a claim of constitutional right was asserted (*Essanay Film Co.* vs. *Kane, supra*).

We respectfully submit, therefore, that the decree here should be affirmed upon the authority of *Essanay Film Co.* vs. *Kane, supra,* irrespective of the merits, or rather the lack of merit, of the

alleged constitutional question here attempted to be set up.

## III.

### As to the constitutionality of the Mortgage Law of Porto Rico.

The appellants expressly admit, near the bottom of page 3 of their memorandum, that

> "Under the laws of Porto Rico any defense that might under our law be interposed in an action brought to foreclose a mortgage may be made the subject of a separate action to annul the mortgage."

They admit, further, that if the property be sold in the foreclosure proceeding before the suit to annul the mortgage is determined, the mortgagors, in case the action to annul is successful, may yet "*pursue the property and through further legal action regain possession.*" (See bottom of page 3 and top of page 4 of their memorandum).

It is manifest, therefore, that there is no deprivation of property and that the alleged question as to constitutionality does not involve anything more substantial than a mere matter of procedure. And it was in recognition of that fact that this court, in *Torres* vs. *Lothrop,* 231 U. S., 171, made the observations quoted at page 7 of our motion papers. The only comment made by the appellants with reference to that case is their assertion, at pages 12 and 13 of their memorandum, that "no facts are set forth which could be made the basis of an action under the laws of Porto Rico or which could be set up as a proper defense in a foreclosure action in the United States." That

simply means that in truth there was no defense to the mortgage; and we already have shown that the same remark can be made with equal force with respect to the case at bar. In no event, however, does that circumstance detract from the force of the opinion of the late Chief Justice, who was especially learned in the civil law as well as in the law of the Constitution.

At pages 13 and 14 of their memorandum the appellants lay great stress upon the dissenting opinion of Mr. Justice MacLeary in *Gimenez* vs. *Brenes,* 10 Porto Rico, 124. Strangely enough, however, the only quotation they give from his opinion is a paragraph in which he was discussing, not the constitutional question, but an entirely different question as to whether the provisions of the Mortgage Law with respect to foreclosures had been repealed by certain provisions of the Porto Rican Code of Civil Procedure. As a matter of fact Mr. Justice MacLeary did *not* hold that the Mortgage Law was unconstitutional. At page 138 he expressly stated that the "only question arising on this appeal" was whether or not the Mortgage Law had been modified, amended or repealed by any subsequent law. It is true that he made some comments upon the question "whether or not the Mortgage Law was annulled by the Constitution of the United States immediately on the change of sovereignty from the Spanish to the American Government" (relying largely upon Mr. Webster and Bouvier's Law Dictionary), but he then concluded (p. 142):

> "However, this court has not heretofore had its attention directly called to this discrepancy between the Constitution of the United States, or the American system of government, and the proceedings established by the Mortgage Law, and it is not neces-

> sary, in my opinion, for the decision of this present case, that the question should be now definitely decided."

In his comments upon the constitutional question Mr. Justice MacLeary completely overlooked the fact that in what he called the "declarative suit" the mortgagor could file a cautionary notice with the Registry of Property and thereby prevent the loss of his land (see pp. 140, 141); and in the subsequent case of *American Trading Co.* vs. *Monserrat*, 18 Porto Rico, 268, cited at pages 8 and 9 of our motion papers, it was expressly held that the filing of such cautionary notice affords a complete remedy and makes the issuance of an injunction wholly unnecessary.

*Torres* vs. *Lothrop, supra*, was decided by this court long after Mr. Justice MacLeary had made his comments in *Gimenez* vs. *Brenes, supra;* and we again repeat that the remarks of Chief Justice White in that case conclusively establish that there is no merit whatever in the contention that the system of mortgage foreclosures in Porto Rico operates as denial of due process of law.

The utterly erroneous notion underlying the appellants' contention is well illustrated by the following statement appearing at pages 15 and 16 of their memorandum:

> "In the course of time the local laws should be based entirely upon or be *consistent with the common law.* This will be a slow process and cannot be done by legislative enactment alone. The Federal courts must assume this responsibility of *making the local laws consistent with our jurisprudence.*"

That is the precise thing which the Federal court in Porto Rico is *not* to do. See last para-

graph of opinion by Mr. Justice HOLMES in *Diaz* vs. *Gonzales*, delivered February 19, 1923, and the other authorities cited at page 10 of our motion papers.

We respectfully submit that the appellants' own memorandum demonstrates that the case presents no question deserving of further argument, and that the decree should be affirmed.

Respectfully submitted,

CARROLL G. WALTER,
Counsel for Appellees.

## BIANCHI ET AL. *v.* MORALES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 934. Motion to affirm or advance, and to vacate stay, submitted April 16, 1923.—Decided May 7, 1923.

1. The court may affirm a decree dismissing a suit, without putting the parties to the expense of printing the full record, when the facts stated and admitted in the motion papers make it plain that the suit cannot be maintained. P. 171.
2. The law of Porto Rico providing for summary foreclosure of mortgages without allowing other defenses than payment, but leaving the mortgagor plenary opportunity to assert other objections by separate suit, clearly does not deprive him of property without due process of law. *Id.*

Affirmed.

APPEAL from a decree of the District Court of the United States for Porto Rico, dismissing, for want of jurisdiction, a bill to restrain summary foreclosure proceedings.

*Mr. Phelan Beale* and *Mr. George W. Study* for appellants.

*Mr. Carroll G. Walter* for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity filed in the District Court to restrain proceedings under the Mortgage Law of Porto Rico to foreclose a mortgage. That law gives a summary suit in which, speaking broadly, no defence is open except payment, Mortgage Law Regulations, Art. 175, and it is contended that this deprives the plaintiffs, (appellants,) of their property without due process of law. The statutes give a separate action to annul the mortgage in which any defence to it may be set up, and also provide for a cautionary notice, Mortgage Law, Art. 42; Mortgage Law Regulations, Art. 91, which the Supreme Court of Porto Rico regards as a sufficient substitute for an injunction. *American Trading Co.* v. *Monserrat*, 18 P. R. 268. See *Romeu* v. *Todd*, 206 U. S. 358. The bill was dismissed by the District Court for want of jurisdiction. The appellees move that the decree be affirmed.

The facts stated and admitted in the motion papers make it so plain that the bill cannot be maintained that we shall affirm the decree below without putting the parties to the expense of printing the full record. Apart from other matters urged by the appellees the constitutional objection is simply another form of the objection to the separation between possessory and petitory suits familiar to countries that inherit Roman law and not wholly unfamiliar in our own. The United States, the States, and equally Porto Rico, may exclude all claims of ultimate right from possessory actions, consistently with due process of law. *Grant Timber & Manufacturing Co.* v. *Gray*, 236 U. S. 133. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554. Before these decisions it had been strongly intimated by Chief Justice White that the foreclosure by summary process allowed by the law of Porto Rico was valid, *Torres* v. *Lathrop, Luce & Co.*, 231 U. S. 171, 177, and a decision to the same effect was rendered by

the Supreme Court of the Island. *Giménez* v. *Brenes*, 10 P. R. 124. In view of these decisions we are of opinion that the constitutional question raised was only colorable and that the decree dismissing the bill was right.

*Decree affirmed.*

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OLIVER IRON MINING COMPANY v. LORD.